BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EVA J. FELIPE Claimant	)	
VS.	)	
CREEKSTONE FARMS PREMIUM BEEF Respondent	)	Docket No. **1,025,045**
AND	)	
COMMERCE & INDUSTRY INS. CO. Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the August 17, 2007 Award by Administrative Law Judge Nelsonna Potts Barnes. The Board heard oral argument on November 28, 2007.

APPEARANCES

Chris A. Clements of Wichita, Kansas, appeared for the claimant. William G. Belden of Merriam, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the Award incorrectly provided for the payment of temporary total disability compensation and permanent partial disability compensation for the same time period. This calculation error will be corrected by the Board.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained a 65 percent work disability from August 24, 2005, through April 2, 2007, based upon a 90 percent task loss

and a 40 percent wage loss. The ALJ further found claimant was limited to her 10 percent functional impairment after April 2, 2007.

The respondent requests review of the nature and extent of disability, if any; and, whether claimant is entitled to future medical benefits. Respondent argues claimant did not make a good faith effort in finding comparable employment and therefore should be limited to her functional impairment. Respondent further argues claimant has not sustained her burden of proof regarding entitlement to future medical benefits.

Claimant argues she is entitled to a 66.5 percent work disability based upon a 90 percent task and 43 percent wage loss for the time period of August 25, 2005, through April 2, 2007.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It was undisputed that claimant suffered repetitive injuries performing her job duties as a meat packer for respondent. It was further undisputed that claimant's last day worked for respondent was August 24, 2005. Lastly, the evidence established that claimant obtained employment on April 2, 2007, which paid 90 percent or more than her pre-injury average gross weekly wage. Accordingly, after that date claimant's permanent partial disability compensation was appropriately limited to the percentage of her functional impairment.[1]

As claimant was performing her job duties she noticed back pain while packing boxes in March 2005. She advised someone in the office the next day that she had hurt her back. Claimant received medical treatment with the plant's physician. The doctor gave her a prescription, sent claimant to physical therapy and she returned to work. Respondent placed the claimant in the laundry room to do the gloves. Claimant testified her back pain did not improve while working in the laundry room because she was standing a lot.

The claimant was apparently provided conservative treatment with Dr. Paul S. Stein. Thereafter, Dr. Pedro A. Murati examined claimant on September 20, 2005, at the request of claimant's attorney. Dr. Murati performed a physical examination of claimant and diagnosed claimant with low back pain secondary to radiculopathy and myofascial pain

[1] "An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." K.S.A. 44-510e(a).

syndrome bilaterally affecting the mid thoracic paraspinals. The doctor imposed temporary restrictions that in an 8-hour day the claimant should engage in no crawling or lift/carry/push/pull greater than 10 pounds. Claimant should rarely bend, crouch and stoop. She should occasionally sit, stand, walk, climb stairs or ladders, squat or drive. She should limit frequent push/pull to 5 pounds and alternate sitting, standing and walking as well as no work more than 18 inches from the body.

Claimant then received additional conservative treatment from Dr. John P. Estivo. On January 25, 2006, claimant was examined and evaluated by Dr. Estivo. The doctor took a history from claimant and performed a physical examination. X-rays were taken of claimant's lumbar spine which indicated no abnormalities. Based upon his examination, the doctor diagnosed claimant as having a lumbar spine strain with occasions of right leg pain. The doctor prescribed an anti-inflammatory medication, placed work restrictions on claimant and recommended physical therapy.

On February 27, 2006, claimant returned for a follow-up visit. Claimant was still having lumbar pain with occasional right leg pain. Upon physical examination, Dr. Estivo found some paravertebral muscle spasm in claimant's lower back. Again, the doctor diagnosed claimant with a lumbar spine strain. Dr. Estivo recommended that claimant continue the physical therapy, medication and temporary work restrictions.

Claimant returned again on March 29, 2006. She reported that she was not having any lumbar spine pain but she was still having some right groin pain. The right groin pain was a new symptom. Upon examination, Dr. Estivo found claimant had right hip pain throughout range of motion. X-rays were taken of claimant's right hip which revealed advanced arthritis of the right hip. The doctor diagnosed claimant with a lumbar sprain that had resolved and also advanced degenerative joint disease to the right hip. Dr. Estivo opined claimant had reached maximum medical improvement with regard to the lumbar spine strain and that her right hip degenerative joint disease was neither caused nor aggravated by her work-related injury on May 17, 2005. Based upon the AMA *Guides*[2], Dr. Estivo rated claimant's lumbar spine strain at 0 percent since it had resolved. The doctor did not place any permanent restrictions on claimant. The doctor further opined claimant was capable of performing all of the tasks outlined by Doug Lindahl.

On April 17, 2006, claimant was examined and evaluated again by Dr. Murati due to complaints of mid and low back pain which was radiating into the right lower extremity with numbness and tingling. The doctor diagnosed claimant with low back pain secondary to symptomatic degenerative disk disease with signs and symptoms of radiculopathy, bilateral SI joint dysfunction and myofascial pain syndrome affecting the thoracic paraspinals. The restrictions Dr. Murati placed on claimant previously are now permanent.

---

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Based upon the AMA *Guides*, the doctor concluded claimant had a 10 percent whole person impairment due to the low back pain secondary to symptomatic degenerative disk disease with signs and symptoms of radiculopathy. For the myofascial pain syndrome affecting the thoracic paraspinals, claimant has a 5 percent whole person impairment. Using the Combined Value Chart, these whole person impairments result in a 15 percent whole person impairment. Dr. Murati reviewed the list of claimant's former work tasks prepared by Mr. Hardin and concluded claimant could no longer perform 9 of the 10 tasks for a 90 percent task loss.

On June 26, 2006, the ALJ ordered an independent medical examination by Dr. Pat Do to determine a rating and restrictions, if any. Dr. Do performed a physical examination and diagnosed claimant as having myofascial pain syndrome of the low back. The doctor placed permanent restrictions on claimant of no lifting greater than 20 pounds on an occasional basis; 10 pounds on a frequent basis; limited bending and stooping to an occasional basis no more than 90 degrees at the waist, no climbing ladders, and occasional climbing stairs. Based upon the AMA *Guides*, Dr. Do placed claimant in DRE Category II for a 5 percent whole person impairment.

Jerry D. Hardin, a personnel consultant, conducted a personal interview with claimant on October 16, 2006, at the request of claimant's attorney. He prepared a task list of 10 nonduplicative tasks claimant performed in the 15-year period before her injury. Mr. Hardin concluded claimant was capable of earning minimum wage of $5.15 or $206 per week using either Drs. Murati or Do's restrictions.

Doug Lindahl, a vocational rehabilitation counselor, conducted a personal interview with claimant on January 25, 2007, at the request of respondent's attorney. He prepared a task list of 11 nonduplicative tasks claimant performed in the 15-year period before her injury. At the time of the interview, the claimant was employed part-time as a maid at a Best Western hotel earning $6.25 per an hour. Mr. Lindahl opined claimant was capable of earning from $6.25 to $9 an hour or between $250 and $360 a week.

The ALJ analyzed the evidence regarding claimant's functional impairment in the following manner:

> The Respondent relies on Dr. Estivo who found a 0% impairment of function rating and released Claimant without permanent restrictions when he last examined her on March 29, 2006. Dr. Estivo based his opinion on his examination and Claimant's statement that she had no back pain on March 29, 2006. However, Claimant was examined by Dr. Murati on April 17, 2006 and advised him that she had mid and low back pain radiating down into her right leg. Moreover, Claimant was examined by Dr. Do on September 11, 2006, and was still complaining of pain in her low back radiating into the right leg. The Court finds the opinions of Drs. Murati and Do to be

> credible and persuasive and concludes that Claimant sustained a permanent partial impairment of function to her back.[3]

The Board agrees and affirms the ALJ's further determination that claimant met her burden of proof to establish she suffers a 10 percent permanent partial functional impairment.

The claimant's employment with respondent was terminated on March 1, 2006, and she was released from medical treatment by Dr. Estivo on March 29, 2006. The respondent disputed whether claimant made a good faith effort to retain her employment with respondent or search for other employment.

Because claimant has sustained an injury that is not listed in the "scheduled injury" statute, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the worker's ability to earn wages rather than the actual post-

---

[3] ALJ Award (Aug. 17, 2007) at 5.

[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). But see *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007), in which the Kansas Supreme Court held, in construing K.S.A. 44-510e, the language regarding the wage loss prong of the permanent disability formula was plain and unambiguous and, therefore, should be applied according to its express language and that the Court will neither speculate on legislative intent nor add something not there.

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

injury wages being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[6]

After claimant began receiving medical treatment the respondent placed her in a light-duty job in the laundry room. Apparently, the claimant was placed on a family medical leave of absence starting August 25, 2005, as claimant's last day working for respondent was August 24, 2005.[7] The claimant continued to receive medical treatment until Dr. Estivo determined she was at maximum medical improvement and released her to return to work on March 29, 2006. But in a letter dated February 27, 2006, respondent had already notified claimant that her employment was being terminated effective March 1, 2006.

When Dr. Estivo released claimant from medical treatment on March 29, 2006, claimant had already been told that she had been terminated from her employment with respondent. The record simply does not contain an adequate explanation why claimant did not start her job search until June 27, 2006. There were some indications in the record that claimant may have misunderstood what she was supposed to do when she was released from treatment but she agreed that she knew at that time that her employment with respondent had been terminated.

The claimant's failure to start her job search after she was released from treatment on March 29, 2006, until June 26, 2006, does not establish a good faith effort to obtain appropriate employment. Accordingly, for the time period from March 30, 2006, through June 26, 2006, a wage must be imputed to claimant. The ALJ imputed the $6.25 per hour wage claimant later obtained at her job with Best Western and multiplied that times 40 hours. The Board agrees and finds claimant retained the ability to earn a $250 gross average weekly wage. This calculates to a 40 percent wage loss.

The work disability is determined by averaging the task loss with the wage loss.[8] The next determination is the percentage of claimant's task loss. Dr. Murati reviewed the list of claimant's former work tasks prepared by Mr. Hardin and concluded claimant could no longer perform 9 of the 10 tasks for a 90 percent task loss. Although Dr. Estivo released claimant with no restrictions and opined she had no task loss, the Board finds the opinion of Dr. Murati more persuasive in this instance as the court ordered independent

---

[6] *Id.* at 320.

[7] R.H. Trans. Cont'd. at 7.

[8] K.S.A. 44-510e(a).

medical examiner, Dr. Do also concluded claimant did suffer permanent impairment and imposed restrictions similar to those used by Dr. Murati. Consequently, the Board finds claimant suffered a 90 percent task loss. Averaging the 90 percent task loss and the 40 percent wage loss results in a 65 percent work disability for the time period from March 30, 2006, through June 26, 2006.

Claimant began her job search June 27, 2006, and after contacting Rubbermaid on July 27, 2006, was offered a job. Her job search list indicated she had contacted 11 prospective employers in the approximate one month of her job search. She began the job at Rubbermaid on August 2, 2006, but only worked until approximately August 13, 2006, when she had to quit because of hand pain. There is no indication in the record what claimant was paid for this job. From August 14, 2006, through August 22, 2006, claimant did not engage in a good faith job search. She again started looking for work on August 23, 2006, and on October 13, 2006, successfully obtained employment at Best Western. Her job search list indicated she had contacted 16 prospective employers between August 23, 2006, and October 13, 2006.[9]

Claimant started working at Best Western on November 8, 2006. Her job duties were cleaning the rooms, changing the sheets, and cleaning everything in each room. Claimant was paid $6.25 per an hour and worked approximately 20 hours a week. Claimant worked at Best Western for approximately three months. She then again obtained employment with Rubbermaid and started working there on April 2, 2007, making 90 percent or more than her pre-injury average gross weekly wage.

From June 27, 2006, through August 1, 2006, the claimant engaged in a good faith job search and is entitled to a 100 percent wage loss for that time period. Although claimant did not make a significant number of job contacts, given she only has a third grade education and does not speak much English, she obtained employment in a month and it cannot be said she did not make a good faith effort. A 100 percent wage loss averaged with a 90 percent task loss results in a 95 percent work disability for that time period.

Claimant started her first job with Rubbermaid on August 2, 2006, and only worked until approximately August 13, 2006. The claimant failed to meet her burden of proof that she suffered any wage loss during this short period of time and accordingly is not entitled to a work disability for this time period.

Claimant then resumed her job search on August 23, 2006. Again, she made sporadic job contacts which, after a contact with Best Western on October 13, 2006, resulted in a job which claimant started on November 8, 2006. From August 23, 2006, until

[9] R.H. Trans. Cont'd., Ex. 2.

November 7, 2006, claimant made a good faith effort to obtain employment and would again be entitled to a 95 percent work disability for this time period.

After November 8, 2006, claimant began her employment with Best Western but this was a part-time job and she did not continue to look for full-time employment. Consequently, it cannot be said she made a good faith effort to obtain employment during the time period she worked part-time for Best Western and, accordingly her work disability would reduce to 65 percent based upon her failure to continue to make a good faith job search. There is no evidence regarding claimant's job search efforts after the Best Western job and claimant has failed to meet her burden of proof that she was making a good faith job search. Consequently, her 65 percent work disability would continue until she returned to work at Rubbermaid on April 2, 2007. Because that job paid 90 percent or more than her pre-injury average gross weekly wage claimant would then be limited to her functional impairment.

Calculation of the award where there are different percentages of disability for different time periods is accomplished in the following manner. The Board has determined the most equitable method is to calculate the award, or recalculate the award if benefits have already been paid based on a different disability rating, using the new or latest disability rate as though no permanent partial benefits had been paid or were payable under any earlier disability rate. The award so calculated gives the total number of weeks and amounts payable for the award. If permanent partial benefits have previously been paid, based on a different rate of disability, respondent is entitled to a credit for those payments. If the rating goes down, as when the claimant returns to work after being off for a period of time, and the new calculation on the new rating results in fewer weeks than respondent has previously paid, respondent owes nothing more. If the disability rate goes up, as when the claimant is laid off, the new work disability rating is calculated based on 415 weeks (less deduction for temporary total paid over 15 weeks) and the number of weeks of permanent partial benefits paid based on the lower rating is credited against amounts due. The last disability rating or amounts already paid or payable, if higher, become the ceiling on benefits awarded. This method of computation was affirmed by the Kansas Court of Appeals in *Wheeler v. Boeing Co*., 25 Kan. App. 2d 632, 967 P.2d 1085 (1998), *rev. denied* 266 Kan. 1116 (1999). The Board's calculation method requires that for each change in the percentage of disability, the award is calculated as if the new percentage was the original award, thereafter the number of disability weeks is reduced by the prior permanent partial disability weeks already paid or due.

Initially, a payment rate must be determined, which in this case is calculated by multiplying the $400.42 average gross weekly wage by .6667.[10] Such calculation computes to a payment rate of $266.96.

[10] K.S.A. 44-510e(a)(1).

The next step is to determine the number of disability weeks payable by subtracting from 415 weeks the total number of weeks temporary total disability compensation was paid. The first 15 weeks of temporary total disability compensation is excluded. The remainder is multiplied by the percentage of permanent partial general disability.[11]

Herein, the parties agreed claimant was entitled to 30.86 weeks of temporary total disability compensation. Accordingly, 15.86 weeks (30.86 - 15 = 15.86) would be subtracted from 415 weeks and the remainder of 399.14 (415 - 15.86 = 399.14) would be multiplied by the 65 percent permanent partial general disability. Such calculation results in 259.44 weeks for which permanent partial disability compensation is payable.

The same calculation is made for each subsequent change in the work disability with the additional step of deducting the weeks of previously paid permanent partial disability from the total disability weeks payable as determined by each new calculation.

Because claimant cannot receive temporary total disability compensation and permanent partial disability compensation at the same time, for computation purposes, the temporary total disability will be computed starting from the date of accident.

In summary, on March 30, 2006, claimant was entitled to a 65 percent work disability until June 26, 2006, when she began a good faith job search. From June 27, 2006, through August 1, 2006, the claimant engaged in a good faith job search and is entitled to a 95 work disability as previously noted. From August 2, 2006, through August 13, 2006, the claimant failed to meet her burden of proof that she suffered any wage loss during this short period of time and accordingly is not entitled to a work disability for this time period and would be entitled to her functional impairment. From August 14, 2006, through August 22, 2006, claimant did not engage in a good faith effort and her work disability would be 65 percent. From August 23, 2006, until November 7, 2006, claimant again made a good faith effort to obtain employment and would again be entitled to a 95 percent work disability for this time period. On November 8, 2006, claimant began her employment with Best Western and her work disability would reduce to 65 percent until April 2, 2007, when she again returned to work for Rubbermaid making 90 percent or more than her pre-injury average gross weekly wage.

Starting April 2, 2007, claimant's compensation would again be limited to her functional impairment. Because claimant had already been compensated for more permanent partial disability weeks than that sum, the claimant is not entitled to additional compensation from that date forward unless the claimant's percentage of disability is again modified to provide additional weeks of disability compensation.

---

[11] K.S.A. 44-510e(a)(2).

The Board affirms the ALJ's determination that claimant is entitled to future medical upon proper application and approval.[12]

The record does not contain a filed fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated August 17, 2007, is modified as follows:

The claimant is entitled to 30.86 weeks of temporary total disability compensation at the rate of $266.96 per week or $8,238.39 followed by 12.71 weeks of permanent partial disability benefits at the rate of $266.96 per week, or $3,393.06, for a 65 percent work disability beginning March 30, 2006, through June 26, 2006; followed by 5.14 weeks of permanent partial disability benefits at the rate of $266.96 per week, or $1,372.17, for a 95 percent work disability from June 27, 2006, through August 1, 2006; followed by 1.71 weeks of permanent partial disability benefits at the rate of $266.96 per week, or $456.50, for a 10 percent functional from August 2, 2006, through August 13, 2006; followed by 1.29 weeks of permanent partial disability benefits at the rate of $266.96 per week, or $344.38, for a 65 percent work disability from August 14, 2006, through August 22, 2006; followed by 11 weeks of permanent partial disability benefits at the rate of $266.96 per week, or $2,936.56, for a 95 percent work disability from August 23, 2006, through November 7, 2006; followed by 20.57 weeks of permanent partial disability benefits at the rate of $266.96 per week, or $5,491.37, for a 65 percent work disability from November 8, 2006, through April 1, 2007.

For the period commencing April 2, 2007, claimant's permanent partial disability decreases from a 65 percent work disability to a 10 percent functional impairment. But due to the accelerated payout formula in K.S.A. 44-510e, no additional permanent partial disability benefits are payable.

The total award is $22,232.43 which is all due and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of January 2008.

---

[12] K.S.A. 2006 Supp. 44-510k.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Chris A. Clements, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge